National Labor Relations Board Weekly Summary of

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AGI Klearfold, LLC (13-RC-21129; 350 NLRB No. 50) Melrose Park, IL Aug. 9, 2007. The Board reversed the Regional Director's finding that the petitioned-for unit of all press department employees is appropriate. The Board concluded that the smallest appropriate unit is one consisting of the Employer's press and pre-press employees, rejecting the Employer's contention that only an overall production and maintenance unit is the only appropriate unit. [HTML] [PDF]

The Board found that their decision was controlled by the Board's decision in *Moore Business Forms, Inc.*, 216 NLRB 833, 834 (1975). As in *Moore*, the Board found that, under a traditional community-of-interest analysis and according appropriate weight to the long-standing Board precedent that the "traditional lithographic unit" in the printing industry is a combined unit of press and pre-press employees, a unit limited to press department employees is not appropriate and that the smallest appropriate unit consists of the traditional lithographic unit of the Employer's press and pre-press employees.

(Chairman Battista and Members Schaumber and Walsh participated.)

Bradley Pacific Aviation, Inc. (37-RC-4134; 350 NLRB No. 59) Maui, HI Aug. 9, 2007. The Board found that the Employer is engaged in interstate air common carriage so as to bring it within the jurisdiction of the National Mediation Board (NMB) pursuant to Section 201 of Title II of the Railway Labor Act (RLA). Accordingly, it vacated the election and dismissed the petition filed by Petitioner Teamsters Local 996 seeking to represent all full-time and regular part-time fuelers and mechanics employed by the Employer at Maui Kahului Airport in Maui, HI. [HTML] [PDF]

At the Board's request, the NMB considered the record in this case and issued an opinion stating that in its view the Employer is a carrier subject to the RLA.

(Members Schaumber, Kirsanow, and Walsh participated.)

Bridgestone Firestone South Carolina (11-CA-20424; 350 NLRB No. 52) Graniteville, SC Aug. 8, 2007. A Board panel unanimously adopted the judge's finding that the Respondent, which operates a tire-manufacturing plant in Graniteville, South Carolina, did not violate Section 8(a)(3) and (1) of the Act by terminating employee Jeffrey Cockrell. But the Board reversed the judge's findings that the Respondent violated Section 8(a)(1) by creating an impression of surveillance or by unlawfully interrogating and threatening Cockrell. Finally, the Board reversed the judge's finding that the Respondent violated Section 8(a)(3) and (1) by issuing Cockrell a written disciplinary action. [HTML] [PDF]

The Board overturned the judge's finding that the Respondent's letter to plant employees thanking employees "who have chosen to provide information . . . regarding the recent attempt" to organize the facility constituted the creation of an unlawful impression of surveillance. The Board found that employees would not reasonably assume from the statement that their union

activities had been placed under surveillance because the Respondent merely relayed to employees that certain coworkers had voluntarily provided information about the existence of the union campaign; there was no evidence or implication that management had previously solicited or coerced that information.

The Board also overturned the judge's finding that the Respondent unlawfully interrogated Cockrell, who was questioned by the Respondent after being involved in a heated exchange about unionization with other workers in the employee break room at the plant. After the exchange took place, a coworker complained about Cockrell's alleged profane verbal and physical conduct, leading the Respondent to solicit an explanation from Cockrell. In the course of questioning Cockrell, the Respondent repeatedly asked him to verify whether he made the profane statements attributed to him by coworkers, but made clear to him that they were not asking him to discuss his views on unionization. Therefore, the Board found that the interrogation did not reasonably tend to restrain, coerce, or interfere with rights guaranteed by the Act. *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), enfd. 760 F.2d 1006 (9th Cir. 1989).

Likewise, the Board overruled the judge's finding that supervisor Dovie Majors unlawfully threatened Cockrell at the end of the investigation by telling him that she would recommend his termination unless he was more forthcoming with his side of the story. Majors' statement could not reasonably been understood as a threat to discipline Cockrell because of his union activities. *Waste Stream Management*, 315 NLRB 1099, 1100 (1994).

The Board also found that the discipline imposed on Cockrell for his break room conduct did not violate Section 8(a)(3) and (1) because there was no evidence of employer animus. Sears, Roebuck & Co. 337 NLRB 443, 443 (2002). The Board went on to note that even if animus had been established, the Respondent successfully demonstrated that the discipline would have been imposed on Cockrell anyway.

(Chairman Battista and Members Schaumber and Kirsanow participated.)

Charge filed by the Steelworkers; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Aiken, Jan. 19-21, 2005. Adm. Law Judge Lawrence W. Cullen issued his decision May 4, 2005.

Columbus Symphony Orchestra, Inc. (9-RC-18137; 350 NLRB No. 49) Columbus, OH Aug. 6, 2007. Contrary to the Regional Director, the Board found that there were no special circumstances that would warrant deviating from applying the traditional voting eligibility formula set out in *Davison-Paxon Co.*, 185 NLRB 21 (1970), to determine the voting eligibility of employees in the petitioned-for unit of full-time, part-time, per diem and casual stagehands. The Board remanded the proceeding to the Regional Director for further appropriate action. [HTML] [PDF]

The Employer is a professional symphony orchestra that performs on a 46-week, year-round schedule that includes a 7-week schedule of performances in the summer that are held in a tent set up on the lawn of a corporate sponsor. The Employer hires casual employees during the entire year, with the majority of casual employees hired in the summer to set up and take down the tent. The Employer also hires one casual employee to directly assist its full-time stagehand with summer concert production work. The Employer regularly hires for this position from a "pool" of four stagehands with previous experience working for the Employer. In 2005, the person who filled this position worked approximately 200 hours, while the three other casual employees hired from the "pool" worked between 15 and 19 hours each. In 2006, one casual employee worked 140 hours, while three others worked between 37 and 63 hours each.

The Regional Director found that the use of an outdoor venue for summer performances and the Employer's reliance on casual employees to perform a significant percentage of summer production work were "special circumstances" that warranted the application of a modified *Davison-Paxon* formula. The Regional Director further found that the Employer's repeated hiring of the same four casual employees from the "pool" and the fact that they performed the same work as the full-time stagehand, showed that they had a reasonable expectation of future employment with the Employer and possessed a continuing interest in the Employer's terms and conditions of employment. Instead of the standard election eligibility period, which would have been the payroll period preceding the May 2007 election, the Regional Director fashioned a formula based on the number of hours that unit employees worked during the summer of the Employer's 2006 season.

The Board reversed the Regional Director's use of a modified *Davison-Paxon* voting eligibility formula. The Board reiterated that the traditional *Davison-Paxon* formula, under which a part-time or on-call employee is considered to have a sufficient regularity of employment to demonstrate a community of interest with unit employees if that employee regularly averages 4 or more hours of work per week for the last quarter prior to the election eligibility date, is to be applied unless "special circumstances" exist. The Board has found "special circumstances" in the entertainment industry where irregular patterns of employment have required the Board to tailor eligibility formulas to meet those circumstances. However, the Board has consistently applied the standard *Davison-Paxon* formula to entertainment industry employers that operate on a regular, year-round basis. *Wadsworth Theatre Mgmt.*, 349 NLRB No. 22 (2007) and *Steppenwolf Theatre Co.*, 342 NLRB 69 (2004).

The Board emphasized that the Employer has a regular, year-round, 46-week schedule of performances, and found, contrary to the Regional Director, that summer performances at an outdoor venue are not "special circumstances" requiring the traditional *Davison-Paxon* formula to be modified. The Board further found, unlike the Regional Director, that the irregular employment pattern experienced by casual employees during the summers of 2005 and 2006 did not show that they could reasonably expect to be employed in the summer of 2007. The Board directed that the traditional *Davison-Paxon* formula be used.

(Chairman Battista and Members Liebman and Schaumber participated.)

P.G.H.C.C., Inc. d/b/a Pacific Grove Convalescent Hospital (32-CA-22879, 22894; 350 NLRB No. 48) Pacific Grove, CA Aug. 6, 2007. The Board affirmed the administrative law judge's finding that the Respondent's withdrawal of recognition from the Union did not violate Section 8(a)(1) and (5) of the Act. The Board also found it unnecessary to rule on the Respondent's motion to strike the Charging Party's exceptions, because the Charging Party's exceptions were denied. Further, the Board denied the Respondent's request for attorney's fees, finding that the Charging Party's exceptions were not frivolous. The Board ordered that the Respondent cease and desist from soliciting employees to sign a decertification petition.

[HTML] [PDF]

(Chairman Battista and Members Schaumber and Walsh participated.)

Charges filed by SEIU United Healthcare Workers West, Service Employees; complaint alleged violations of Section 8(a)(1) and (5). Hearing at Pacific Grove, Feb.27-28 and March 1, 2007. Adm. Law Judge Gerald A. Wacknov issued his decision May 9, 2007.

Shaw's Supermarkets, Inc. (1-CA-39764, et al.; 350 NLRB No. 55) East Bridgewater, MA Aug. 10, 2007. The Board, in a 2-1 decision, found that the Respondent lawfully withdrew recognition from Food and Commercial Workers Local 1445 after the third year of a 5-year contract. [HTML] [PDF]

The majority noted inter alia that the Respondent had evidence of an actual loss of majority support by the Union, and that there was no contention that the loss of majority support relied on by the Respondent was tainted by unfair labor practices. Dissenting, Member Liebman argued that it was anomalous to permit the Respondent to withdraw recognition at a time when it would not have been permitted to file an election petition, and that *Hexton Furniture Co.*, 111 NLRB 342 (1955) stands for the principle that when an employer may not file an election petition, it is also prohibited from unilaterally withdrawing recognition.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Food and Commercial Workers Local 1445; complaint alleged violation of Section 8(a)(1) and (5). General Counsel filed motion for partial summary judgment Feb. 13, 2003 and Respondent filed cross-motion for summary judgment March 6, 2003.

Summit Express, Inc., Summit Truck Leasing, Inc., and Great Lakes Building Materials, Inc., a Single Integrated Enterprise and SG Construction, LLC (13-CA-41938-1; 350 NLRB No. 51) Aurora, IL Aug. 10, 2007. The administrative law judge found that three respondents owned by the same individual—Summit Express, Inc., Summit Truck Leasing, Inc., and Great Lakes Building Materials, Inc.—were a single employer (Summit/Great Lakes) engaged in the business

of selling drywall to commercial customers. In June 2004, Summit/Great Lakes discharged its truck drivers and warehousemen and contracted with SG Construction, LLC to take over its drywall-delivery operations. SG Construction hired the former Summit/Great Lakes employees. The judge found that Summit/Great Lakes and SG Construction were alter egos and that they were jointly and severally liable for all Section 8(a)(1), (2), and (3) violations that he found were committed. No exceptions were filed to the judge's single employer finding or to his unfair labor practice findings. The Respondents did except to the judge's alter ego finding. [HTML] [PDF]

The judge found no evidence of common ownership between Summit/Great Lakes and SG Construction but found that common ownership was not indispensable to finding alter ego status. He concluded that they were alter egos because Summit/Great Lakes' decision to terminate its employees and contract with SG Construction was to avoid having to deal with Teamsters Local 673 that its employees were supporting. He also drew an adverse inference against the Respondents because they failed to call the owner of SG Construction to testify.

Although common ownership is not a prerequisite for an alter ego finding, the Board has found an alter ego relationship in the absence of substantially identical ownership only where both companies were either wholly owned by members of the same family or nearly totally owned by the same individual, or where the older company maintained substantial control over the new company. *Superior Export Packing Co.*, 284 NLRB 1169, 1170 (1987), enfd. 845 F.2d 1013 (3rd Cir. 1988).

In reversing the judge, the Board majority of Chairman Battista and Member Schaumber noted that the General Counsel had the burden of proving the existence of the alter ego relationship but presented no direct evidence that Summit/Great Lakes and SG Construction shared common ownership or that Summit/Great Lakes substantially controlled SG Construction. The majority acknowledged that Summit/Great Lakes may have had an unlawful motive for contracting with SG Construction, but that does not establish that they are alter egos. The record shows SG Construction to be independently owned, and that Summit/Great Lakes had no financial interest in it. Absent evidence of common ownership and substantial control, the Board will not find alter ego status. The absence of substantially identical management and supervision reinforces that conclusion.

In dissent Member Liebman would find there was overwhelming evidence of unlawful motive as well as evidence that Summit/ Great Lakes exercised substantial control over SG Construction. In Member Liebman's view, the "overwhelming favorable" contract terms allowed Summit/Great Lakes to control SG Construction's hiring and the terms and conditions of its employees. Further, because Summit/Great Lakes was SG Construction's sole customer it could economically dominate SG Construction. Member Liebman would also find that the judge properly drew an adverse inference from the failure of SG Construction's owner to testify.

The majority disagreed that the contract terms showed that SG Construction was substantially controlled by Summit/Great Lakes. They found it is not surprising or unusual that the contract terms, for example, permitted Summit/Great Lakes to set "minimum qualifications" for SG Construction employees who would be performing services for Summit/Great Lakes. While Summit/Great Lakes may have some control, that control was consistent with the interest of a company that hires another to perform services for it. Further, the fact that Summit/Great Lakes was SG Construction's only customer does not establish that it was substantially controlled by Summit/Great Lakes.

The majority also disagreed that it was appropriate to draw an adverse inference. The General Counsel issued a subpoena duces tecum to SG Construction's owner, or the keeper of the records, to produce SG Construction corporate and business records. The records were produced and the keeper of records testified. The General Counsel did not assert that SG Construction failed to adequately respond to the subpoena and, at the hearing, reserved the right to also call the owner, if necessary, but never called him.

Because the Respondents were not alter egos, they are not jointly and severally liable for all violations. Each Respondent is liable only for the violations it committed. Certain violations found to have been committed by SG Construction, and predicated on it being Summit/Great Lakes' alter ego, were dismissed. Accordingly, the Board modified the conclusions of law, remedy, and substituted new Orders and Notices.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Teamsters Local 673; complaint alleged violation of Section 8(a)(1), (2) and (3). Hearing at Chicago, March 28-29 and April 7-8, 2005. Adm. Law Judge David L. Evans issued his decision Aug. 4, 2005.

Trustees of Columbia University in the City of New York (2-RC-22355; 350 NLRB No. 54) New York, NY Aug. 9, 2007. The majority of Members Schaumber and Kirsanow reversed the Regional Director and overruled the Petitioner's objection, which alleged that the Employer's refusal to provide the Petitioner with the electronic mail (e-mail) addresses of eligible voters thwarted the manifest purpose of the requirements of Excelsior Underwear, 156 NLRB 1236 (1966). The Board majority found that the Employer fully complied with its Excelsior requirements as heretofore defined by the Board. [HTML] [PDF]

The Employer operates an institute of higher learning, including a research vessel named the *R/V Maurice Ewing*. The parties stipulated that a unit of all unlicensed crew members of the *R/V Maurice Ewing* constitute an appropriate unit. The parties also stipulated to the date, time, and location of the mixed manual and mail ballot election. The vessel and crew are typically at sea for several days or weeks at a time. The vessel was at sea for most of the preelection period, and the manual election was held aboard the vessel. Although there is no evidence whether the

vessel receives U.S. Mail, the crew did have access to the Employer's e-mail system aboard the vessel for personal business. The Petitioner is a long-standing maritime labor organization, and its organizing campaign began while the vessel was being repaired in Tampa, Florida.

At the pre-election hearing, the Petitioner requested that, in addition to providing it with the names and home addresses of eligible voters as required by *Excelsior*, the Employer be required to provide Petitioner with the e-mail addresses of eligible voters because of the unique circumstances of this case. The hearing officer rejected the request, and in the Decision and Direction of Election, the Regional Director affirmed the hearing officer. The Petitioner filed a request for review. The Board denied the request for review, but "without prejudice to the Petitioner's right to file an objection concerning the issue raised on review." Following the election, the Petitioner filed an objection, alleging that the Employer's failure to provide the e-mail addresses thwarted the manifest purpose of the *Excelsior* rule.

The Regional Director found merit in the Petitioner's objection. In the Supplemental Decision and Direction of Second Election, the Regional Director found that based on the unusual circumstances of this case, it would be inconsistent with the "animating principles" of *Excelsior* and its progeny to find that the Employer's submission of names and home addresses to the Petitioner, without the e-mail addresses, satisfied the requirements of *Excelsior*. The Employer sought review, contending that it was not compelled to furnish the Petitioner with the e-mail addresses at issue in this case, under *Excelsior* or otherwise, and that requiring e-mail production here would be a retroactive modification of *Excelsior* requirements, which would deprive it of due process. The Petitioner urged affirmance of the Regional Director's Supplemental Decision.

Contrary to the Regional Director and the dissent, the majority found that the Employer timely provided the Regional Director with a complete and accurate list of unit employees and their home address, and thus *fully* complied with existing Board precedent interpreting *Excelsior*. The majority emphasized that no Board case ever has held that the failure to provide the e-mail addresses of eligible voters constitutes objectionable conduct. The majority therefore could not agree with the dissent's contentions that the Employer did not "substantially comply" with *Excelsior*, emphasizing that the list was both complete and accurate. In addition, the majority pointed out that the Petitioner is a maritime union with vast experience and a long history of organizing and representing employees at sea. Although its communication with many of the eligible voters may have been limited while they were at sea, the Petitioner agreed to the election date and details of the election with full knowledge that the vessel would be at sea during most of the election period, and with full knowledge that no Board decision ever had required production of e-mail address in the context of a Board-conducted election.

The majority also emphasized that a "multitude of unanswered and difficult questions exist regarding the potential ramifications, for both employers and employees, of requiring employers to furnish employee e-mail addresses." The majority concludes that the Board is not in a position to extend *Excelsior*, as the Union asks it to do, without the benefit of amicus briefing and a fully developed record. Given the Employer's undisputed compliance with its

Excelsior obligations as they stood as of the date of the Union's request, the majority is unwilling on the facts of this case to characterize that compliance as objectionable conduct.

In dissent, Member Walsh stated:

In the particular circumstances of this case...a list of employees home addresses failed to effectuate the purposes of the *Excelsior* rule: to facilitate an informed electorate by "giving unions the right of access to employees that employers already have." *Special Citizens Futures Unlimited*, 331 NLRB 160, 161 (2000). As the Regional Director found, mailings or visits to the employees' home addresses would have been futile. Because the Petitioner could not contact the employees using the information contained in the *Excelsior* list, the employees were prevented from receiving information with respect to one of their choices, and thereby prevented from exercising their Section 7 rights. Accordingly, the Employer has not substantially complied with the *Excelsior* requirement under the facts of this case.

Member Walsh also rejected the majority's argument that Petitioner agreed to the timing of the election knowing it would be limited in its ability to communicate with the unit employees:

This argument essentially amounts to a contention that by agreeing to the election date, the Petitioner waived its right to communicate with the voters during the preelection period. Although it is true that the Petitioner agreed to the timing of the lection, the Petitioner did not know that the Employer would refuse to provide it with the employees' e-mail addresses.

(Members Schaumber, Kirsanow, and Walsh participated.)

Verizon and its Subsidiary Telesector Resources Group (2-CA-32858; 350 NLRB No. 53) New York, NY Aug. 9, 2007. This case involves a team of workers (the "Hazmat team") who removed hazardous materials from obsolete equipment for the Respondent from 1989 through December 2000. The Board affirmed the judge's findings that the Respondent was an employer of the Hazmat team and that the General Counsel failed to establish that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide the Hazmat team with the benefits provided to bargaining unit employees represented by the Union. [HTML] [PDF]

A Board majority (Chairman Battista and Member Liebman) found that the Respondent violated Section 8(a)(4), (3), and (1) by temporarily laying off nine members of the Hazmat team in May 2000. In finding the violation, the Board majority found that the General Counsel met the initial *Wright Line* burden of proving unlawful motivation for the layoffs, based on the following factors: 1) the timing of the layoffs relative to the Union's March 2000 filling of a charge on behalf of the nine Hazmat workers who were subsequently laid off and the Union's

claim that the bargaining unit's contract should apply to those nine Hazmat workers; 2) the absence of evidence that any Hazmat employees other than those subject to the Union's contract coverage claim were laid off; 3) the "precipitate nature of the layoffs"; 4) the absence of any credible evidence supporting the Respondent's claim that the layoffs were due to a lack of available work; 5) credited testimony that, in fact, work was available for the laid-off employees; and 6) the postrecall employment of the full Hazmat team for the remainder of 2000. The majority then found that the Respondent failed to rebut the General Counsel's prima facie case by establishing that the layoffs would have occurred in the absence of protected conduct. Member Schaumber, dissenting, would dismiss the unlawful layoff allegation, finding that the General Counsel failed to meet its initial burden to establish that the layoffs were motivated by the Respondent's animus against any protected concerted activity.

A different Board majority (Chairman Battista and Member Schaumber) reversed the judge and dismisses allegations that the Respondent unlawfully terminated the Hazmat team in December 2000, assigning its work instead to outside contractors. The majority found that the General Counsel failed to establish a prima facie case under Wright Line that animus against protected conduct was a motivating factor in the Respondent's decision to terminate the Hazmat team and outsource their work. Citing credited testimony and a series of management emails pertaining to the outsourcing decision, the majority found that the Respondent decided to "terminate the unintended employment relationship" that it held with the Hazmat team, and thereby avoid potential liability that it might incur as the team's employer. The majority, citing Oklahoma Fixture Co., 314 NLRB 958 (1994), found that because the Respondent's termination of the Hazmat team was based on a desire to avoid legal liability, rather than motivated by antiunion animus, the terminations did not violate Section 8(a)(3) or (1). Although the majority recognized that the Respondent's concerns about employer liability were triggered by complaints raised by Hazmat team employees, and that those complaints constituted protected concerted activity, the majority concluded that it does not necessarily follow that the Respondent's decision was "motivated by animus' toward those complaints."

In dissent, Member Liebman would affirm the judge and find the Respondent's termination of the Hazmat team violated Section 8(a)(3) and (1). In her view, a violation arises because it is clear that the Respondent would not have terminated the Hazmat employees but for the fact that they engaged in protected concerted activity; the Respondent was not "free to terminate statutory employees, who had complained about being miscategorized as nonemployees, in order to avoid having to recognize their statutory rights and in retaliation for their statutorily protected activity." Further, Member Liebman disagreed with the majority's finding that the employees' protected activities in 2000, which took place prior to their December 2000 termination, were not relevant to establishing that the terminations were motivated, at least in part, by animus.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Communications Workers Local 1108; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at New York, May 29-31, July 22-24, and Aug. 5-6, 2002. Adm. Law Judge Steven Fish issued his decision Sept. 30, 2003.

LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Hempstead Lincoln Mercury Motors Corp. (Teamsters Local 917) Hempstead, NY Aug. 9, 2007. 29-CA-27601; JD(NY)-38-07, Judge Joel P. Biblowitz.

Windstream Corp. (Electrical Workers [IBEW] Locals 463, 1189, 1507, 1929, 2089 and 2374) Meadville, PA Aug. 9, 2007. 6-CA-35483; JD-51-07, Judge Wallace H. Nations.

American Girl Place, Inc. d/b/a American Girl Place New York (Actors' Equity Association) New York, NY Aug. 10, 2007. 2-CA-37791; JD(NY)-367-07, Judge Steven Davis.

CMPJ Enterprises d/b/a Holiday Inn Express (Hotel, Hospital, Restaurant and Tavern Employees Local 21) Rochester, MN Aug. 7, 2007. 18-CA-18254; JD-55-07, Judge Jane Vandeventer.

LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

(In the following cases, the Board adopted Reports of Regional Directors or Hearing Officers in the absence of exceptions)

DECISION AND DIRECTION [that Regional Director open and count ballots]

Cenveo Inc., Philadelphia, PA, 4-RD-2107, Aug. 8, 2007 (Chairman Battista and Members Kirsanow and Walsh)
